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KAMALA BHAIE MG PILLAI

v.

STANDARD CHARTERED BANK MALAYSIA BHD

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HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[WRIT SUMMONS NO: S6-22-196-2000]
17 AUGUST 2006

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BANKING: *Banks and banking business - Payment of cheques - Bank clearing cash cheques issued by legal firm - Cheques issued during robbery and under duress - Claim for refund of monies paid out - Whether bank liable - Whether in breach of fiduciary duty and duty of care*

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The plaintiff, an advocate and solicitor, had opened a current account in the name of her legal firm in the defendant bank's branch in Seremban. It was not in dispute that as of November 1999, the credit balance of the account stood at RM160,941.45. On 2 November 1999, at about 11am, 5 robbers had entered the plaintiff's office and forced the plaintiff to sign two cash cheques amounting to RM178,000. At about 11.40am, while the others remained, two of the robbers went to the bank to cash the cheques. At about 12 noon, the plaintiff received a telephone call from the bank asking if it was in order to pay out on the cheques, to which the plaintiff answered "yes". The bank honoured the cheques, and in so doing, treated the extra RM17,058.55 so paid out as overdraft on the account. The plaintiff alleged that the assent for the bank to cash out the cheques was given under duress, threat or order of the robbers, and in the circumstances claimed for the return of the RM160,941.45 that the bank had removed from her account. It was the plaintiff's stand that the bank, in paying out the robbers, was guilty of breach of fiduciary duty or duty of care to her. The bank denied the existence of any such duty, and in any case counter-claimed for the extra sum of RM17,058.55 which it treated as overdraft aforesaid.

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Held (dismissing the plaintiff's claim; allowing defendant's counter-claim):

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(1) It is established law that the relationship between a bank and its customer is purely contractual, basically as debtor and creditor, and that in paying out on cheques issued by the customer, the bank acts as an agent for the customer. As an agent, a duty of care arises for the bank to act with reasonable care and skill in interpreting, ascertaining and acting in accordance with the instructions of the customer. The duty of care however extends only to the limit of the funds available in the customer's account. (para 12)

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(2) The cheques here were issued by a legal firm. The legal profession holds its members out as persons of integrity and discretion. Hence, unless there are other standing instructions to the contrary, the defendant is entitled to pay out on any amount not exceeding the amount in the account. (para 13)

(3) The bank is not obliged to pay out monies in excess of the amount in a customer's account. A cheque in excess of the amount in the customer's account places the banker in a position where it has to consider whether or not to advance the customer the necessary funds into the account in order to honour the customer's cheque. In this case, the excess sum is RM17,058.55, *ie*., just over 10% of the amount in the plaintiff's account. That being the case, and considering the defendant's query and plaintiff's affirmative answer "yes" herein, the advance of the sum to the plaintiff as a member of the legal profession is not an unreasonable or reckless act on the part of the defendant. (paras 15 & 16)

(4) There is no evidence that the defendant knew of what occurred in the plaintiff's office. And it is also unreasonable to expect the bank as it is of the plaintiff to foresee that there is robbery. On the other hand, only the plaintiff knew there was a robbery and could easily have caused the bank to dishonour the cheques by a defective signature. That might not save the day, but equally, the mere writing out of two cheques that exceeded the amount in the account by just over 10% cannot serve to transfer the plaintiff's misfortune unto the bank. (para 17)

Case(s) referred to:
Asamaju Enterprises v. Malayan Banking [1996] 1 CLJ 71 HC ***(refd)***
Foley v. Hill [1848] 2 HL Cas 28 ***(refd)***
Joachimson v. Swiss Bank Corporation [1921] 3 KB 110 ***(refd)***
Lipkin Gorman v. Karpnale Ltd [1992] 4 All ER 408 ***(refd)***
Tan Ah Sam v. Chartered Bank [1971] 1 MLJ 28 ***(refd)***
UMBC v. Liew Yona [1975] 1 MLJ 148 ***(refd)***
Verjee v. CIBC Bank Trust Co [2001] L Rep 279 ***(refd)***
Westminster Bank Ltd v. Hilton [1926] 43 TLR 124 ***(refd)***

For the plaintiff - Mohamed Haniff Khatri Abdulla; M/s Haniff & Rajendran
For the defendant - Mahaletchumi Balakrishnan; M/s Skrine & Co

Reported by Wan Sharif Wan Ahmad

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JUDGMENT

Abdul Wahab Patail J:

[1] The plaintiff Kamala Bhaie d/o M.G. Pillai is seeking the following against the defendant bank:

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(i) A declaration that the plaintiff is not liable to pay the sum of RM17,058.55 to the defendant;

(ii) General damages of RM160,941.45;

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(iii) Further damages as assessed or as deemed fit by the court;

(iv) Punitive damages of RM2,000,000.

(iv) Damages for suffering RM1,000,000;

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(v) Interest on above at 4% per annum commencing 2 November 1999 to the date of the writ, and thereafter 8% per annum until full settlement;

(vii) Costs;

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(viii) Such other reliefs as the court thinks fit.

[2] The plaintiff is at all material times an advocate and solicitor practicing under the name of Tetuan Kamala Pillai & Associates at No. 30, Tingkat 2, Jalan Yam Tuan, 70000 Seremban, Negeri Sembilan.

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[3] The defendant is a licensed bank.

[4] Sometime in or about the month of July 1998, the plaintiff had opened a current account in the name of her legal firm in the defendant bank's branch at No 127A-128, Jalan Dato' Bandar Tunggal, P.O. Box
G 42, 70700 Seremban.

Plaintiff's Case

[5] According to the statement of claim, on 2 November 1999 at about 11am, five robbers at least one of whom was armed with a pistol
H and a parang had come to the plaintiff's firm and had forced the plaintiff to sign cheques as follows:

(i) SCB No. 300443	2/22/99	120,000
(ii) SCB No. 300445	2/11/99	58,000

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Then at about 11.40am, while the others remained, two of the robbers went to the bank to cash the cheques. At about 12 noon, the plaintiff received a telephone call from a person who introduced himself as Syed, who asked if it is in order to pay out on the cheque since the cheque were cash cheques.

[6] The plaintiff says that because of duress and/or threat and/or order of the robbers threatening her and her employees' safety and/or her customers and/or her acquaintances who were in her office, the plaintiff had answered "Yes". The cheques were cashed, and at about 12.30pm. the remaining three robbers left her office.

[7] At the material time there was only RM160,941.45 in the plaintiff's current account. The total of the two cheques was RM178,000. Accordingly, the plaintiff asserts she had suffered a loss of RM160,941.45 that had been removed from her account.

[8] After that date, the defendant had claimed from the plaintiff the sum of RM17,058.55 as overdraft on the said account. The plaintiff objects on the grounds she had never prior to that date applied for an overdraft, and that the plaintiff had breached the terms of their contract and/or its duty of care and/or fiduciary duty resulting in the loss of that sum, and that the plaintiff in a state of fear cannot be said to have applied for an overdraft.

[9] She supplied particulars of breach of fiduciary duty and or duty of care as follows:

(i) She avers that she suffered emotional and/or mental distress as a result of 2 November 1999 incident and/or as a result of the omission and/or wrongful acts of the defendant, which caused delay and/or failure in obtaining further particulars of the robbers for the purpose of recovery of the stolen money, and resulting in loss and incapacitating the plaintiff's career as a lawyer and her individual ability as a mother and wife whereby the plaintiff's friend, family and/or her life is now put in the state of jeopardy.

(ii) It was submitted that the defendant knew at all times the account is a customer's account of the legal firm. The bank, it was argued, is therefore a constructive trustee of the account. It was argued the fact the plaintiff was not in the habit of issuing such large cheques, making the transaction unusual, the fact the cheques were cash cheques, paid out of customers' account and in excess of the funds in the account, and knowledge of an attempt by a third party to forge the signature about a month earlier, are factors to be taken into account.

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The Defence

[10] The defendant denies liability, and averred that any contractual or other relationship is governed by the express and/or implied terms and conditions of the Business Account Opening Form, the Business Account Signature Form and the Sole Proprietorship Account Form, all of which were signed by the plaintiff on 25 June 1998. It was admitted that a staff of the defendant identifying himself as Syed called to obtain confirmation that the cheques were in order, and upon the confirmation of the plaintiff the amounts were paid out. It was admitted there was only a balance of RM160,941.45 in the account. The defendant asserted the payment was made upon the express confirmation of the plaintiff to make payment. Otherwise the defendant denies owing any other duty of care or fiduciary duty or any knowledge of what occurred in the plaintiff's firm. The defendant averred that by issuing and endorsing the cheques the plaintiff had expressly or by implication requested for an overdraft, and the defendant's officer had obtained the plaintiff's express instructions to issue payment on the amounts in the cheques.

[11] The defendant counter-claimed for the following:

(i) The sum of RM17,058.55;

(ii) Interest thereon at 3.5% + BLR from 3 November 1999 until date of full and final settlement;

(iii) Costs; and

(iv) Such further or other reliefs as the court thinks fit.

Grounds

[12] It is established law that the relationship between a bank and its customer is purely contractual (*Joachimson v. Swiss Bank Corporation* [1921] 3 KB 110, 127), basically as debtor and creditor (*Foley v. Hill* [1848] 2 HL Cas 28; *Lipkin Gorman v. Karpnale Ltd* [1992] 4 All ER 408, 417). In paying out on cheques issued by the customer, the bank acts as an agent for the customer (*Westminster Bank Ltd v. Hilton* [1926] 43 TLR 124: *Lipkin Gorman v. Karpnale Ltd (supra)*). A duty of care arises as an agent, to act with reasonable care and skill in interpreting, ascertaining and acting in accordance with the instructions of the customer. The duty of care extends only to the limit of the funds available in the customer's account (*Tan Ah Sam v. Charted Bank* [1971] 1 MLJ 28). The duty of care of the bank is satisfied if in circumstances that are so out of the ordinary as to arouse doubts in an honest and reasonable banker as to the *bona fides* of the transaction (*Lipkin Gorman v. Karpnale Ltd (supra)*; *Asamaju Enterprises v. Malayan Banking* [1996] 1 CLJ 71 HC).

[13] Now, the cheques in this case were issued by a legal firm, with strict rules as to the use of the account under the rules of the legal profession. The legal profession holds its members out as persons of integrity and discretion. Unless there are other standing instructions to the contrary, the defendant is entitled to pay out on any amount not exceeding the amount in the account.

[14] What if the cheque orders the payment of a sum in excess of the sum in the customer's account?

[15] It is law that a bank is not obliged to pay out monies in excess of the amount in a customer's account. A cheque in excess of the amount in the customer's account places the banker in a position where it has to consider whether or not to advance the customer the necessary funds into the account in order to honour the customer's cheque (*UMBC v. Liew Yona* [1975] 1 MLJ 148; *Verjee v. CIBC Bank Trust Co* [2001] 1 Rep 279, 280-3). The sum of the excess in this case is RM17,058.55. It is just over 10% of the amount in the plaintiff's account. Amongst the things ordinarily considered are the credit worthiness and standing of the customer, and the interest of the bank to maintain that person as its customer. All other things being equal, the advance of the sum to the plaintiff as a member of the legal profession is not an unreasonable or reckless act on the part of the defendant.

[16] Particularly so in this case, the fact the sum of the cheques exceeded the amount in the plaintiff's account, and of a previous attempted forgery clearly ought to and did trigger the telephone call to the plaintiff who answered "Yes".

[17] There is no evidence the defendant knew of what occurred in the plaintiff's offices. An apparent overdrawing from a bank account is not an indication there is a robbery. It is as unreasonable to expect the bank as it is of the plaintiff to forsee that there is a robbery. On the other hand only the plaintiff knew that there was a robbery, and could easily have caused the bank to dishonour the cheque by a defective signature. It is true this might not necessarily have saved the day, but certainly the mere writing out of two cheques that exceeded the amount in the account by just over 10% certainly does not serve to only transfer the plaintiff's misfortune upon the bank.

[18] The plaintiff's action was, therefore, dismissed with costs. The defendant's counter-claim was allowed with costs.